

Emerging contaminants and the law

Risk and liability under the *Environmental Protection Act 1994 (Qld).*

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► Overview

- **Context:** Contaminant standards
- **Regulatory framework:**
 - Best practice and standard criteria
 - Environmental duties (including new duties)
- **Liability:** Compliance and offences
- **Case study:** Is compliance with the EA and standards enough?

Contaminant standards.

PFAS



► PFAS standards

Regulated waste

Currently PFAS levels above zero trigger 'regulated waste' requirements

Proposed thresholds:

Contaminant	Solid waste threshold mg/kg	Liquid waste threshold mg/L
PFOS and PFHxS	0.002	0.000002
PFOA	0.001	0.000001
Other PFAS (sum of PFAS excluding PFHxS, PFOA)	0.004	0.00001

EoW Code: Biosolids

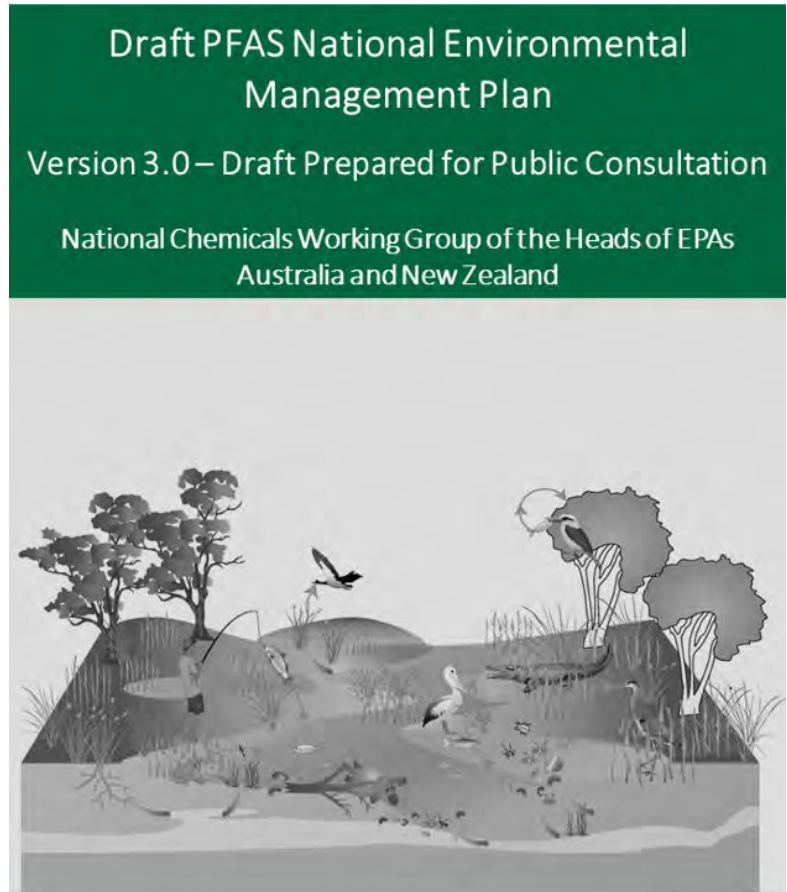
Contaminant	Trigger value
PFOS	0.001 mg/kg
PFOS + PFHxS	0.002 mg/kg
PFHxS	0.003 mg/kg
PFOA	0.004 mg/kg
PFBA, PFPeA, PFHxA	0.001 mg/kg
Sum C ₉ -C ₁₄ Perfluoroalkyl carboxylic acids	0.01 mg/kg
Perfluoroalkyl sulfonamides	0.001 mg/kg
N:2 Fluorotelomer Sulfonic acids	0.004 mg/kg

NEMP

NEMP 2.0 – no specific biosolid standard. Ecological indirect exposure to soils of 0.01mg/kg for PFOS and no limit for PFOA.

Draft NEMP 3.0 – specific PFAS levels for biosolids for restricted and unrestricted use, as well as maximum allowable soil contaminant concentrations

► NEMP 3.0 – PFAS standards



Criteria Type	Margin of Safety	PFOS+PFHxS (mg/kg)	PFOA (mg/kg)
Biosolids threshold restricted use	5	0.0062	0.025
	2	0.015	0.065
	1	0.031	0.13
Biosolids threshold unrestricted use	5	0.00022	0.001
	2	0.00055	0.0025
	1	0.0011	0.005
MASCC	5	0.00022	0.001
	2	0.00055	0.0025
	1	0.0011	0.005

▶ ERA-63 conditions

- ▶ Specific release limits
- ▶ EA conditions may be silent on emerging contaminants
- ▶ Management plans and notification

*“Other than as permitted within this environmental authority, **contaminants** must not be released to any **waters**.”*

*“Other than as permitted by this environmental authority, the release of a **contaminant into the environment** must not occur.”*

*“All **reasonable and practicable** measures must be taken to **prevent the likelihood of environmental harm** being caused.”*



Regulatory framework.

EP Act, best practice, environmental duties

▶ Best practice and standard criteria

Environmental Protection Act 1994 (Qld)

Best practice

- ▶ Ongoing minimisation of environmental harm
- ▶ Cost-effective measures
- ▶ Assessed against the measures currently used nationally and internationally for the activity
- ▶ Strategic planning
- ▶ Administrative systems, training, monitoring and review
- ▶ Public consultation
- ▶ Product and process design

Standard criteria

When?

- ▶ EA amendment application
- ▶ Issuing EEO or TEP

What?

- ▶ Environmental policy
- ▶ Environmental impact studies, assessments or reports
- ▶ Best practice under relevant instruments
- ▶ Financial implications
- ▶ Public interest

► Environmental harm under the EP Act

- ▶ **Environmental harm** is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance
- ▶ **Environmental harm** may be caused by an activity:
 - Whether the harm is a direct or indirect result of the activity; or
 - Whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors
- ▶ **Material environmental harm:**
 - That is not trivial or negligible in nature; or
 - Costs more than \$10,991 to prevent or minimise the harm or rehabilitate or restore the environment
- ▶ **Serious environmental harm:**
 - Irreversible, high impact or widespread; or
 - Caused to an area of high conservation value/special significance; or
 - Causes actual or potential loss of or damage to property up to or over \$109,910, or costs more than \$109,910 to prevent or restore

► New and enhanced environmental duties

General environmental duty

A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm

Duty to restore

A person must take measures, as far as reasonably practicable, to rehabilitate or restore the environment if the person causes or permits an incident involving contamination that results in unlawful environmental harm

Key principles

- Polluter pays
- Proportionality principle
- Primacy of prevention
- Precautionary principle



Liability.

Compliance and offences

► The many tools!

Warning letter or notice

PIN

Interim enforcement orders

Enforcement orders

Prosecution

Direction notice

Environmental audit

Environmental investigation

Transitional environmental program

Environmental protection order

Temporary emissions licence

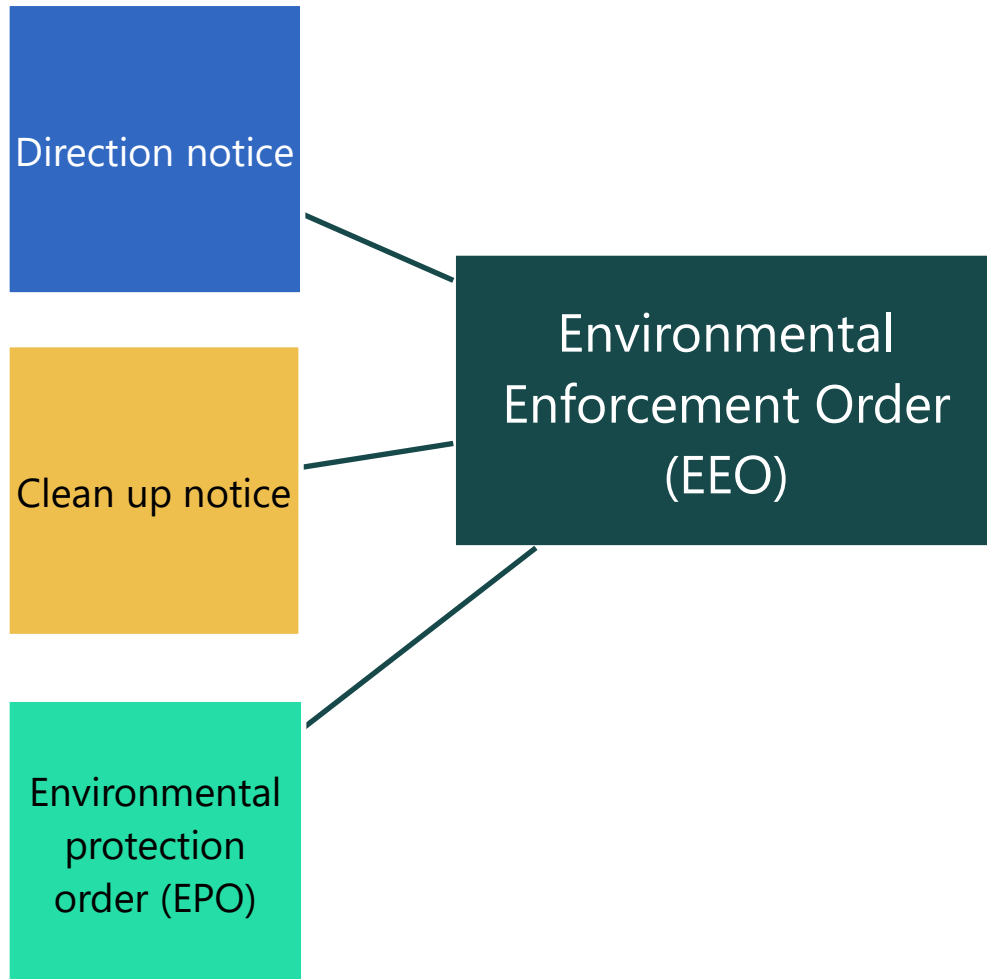
EA conditions –
Notice of proposed amendment

EA conditions –
Amendment by agreement

Suspension of cancellation of EA

Suspension or cancellation of registered suitable operator status

► Environmental enforcement order (EEO)



- Contamination incident or 'enforcement ground'
 - Secure compliance with GED, duty to restore, EA or TEP etc.
- To remove any doubt, it is declared that an EEO may be issued to a person in relation to an activity **even if the person is the holder of an environmental authority** that authorises, or purportedly authorises, the activity
- Can be issued to 'related persons': person who has during the last two years ***been in a position to influence the company's conduct*** in relation to the EP Act

▶ Notice of proposed amendment (NOPA)

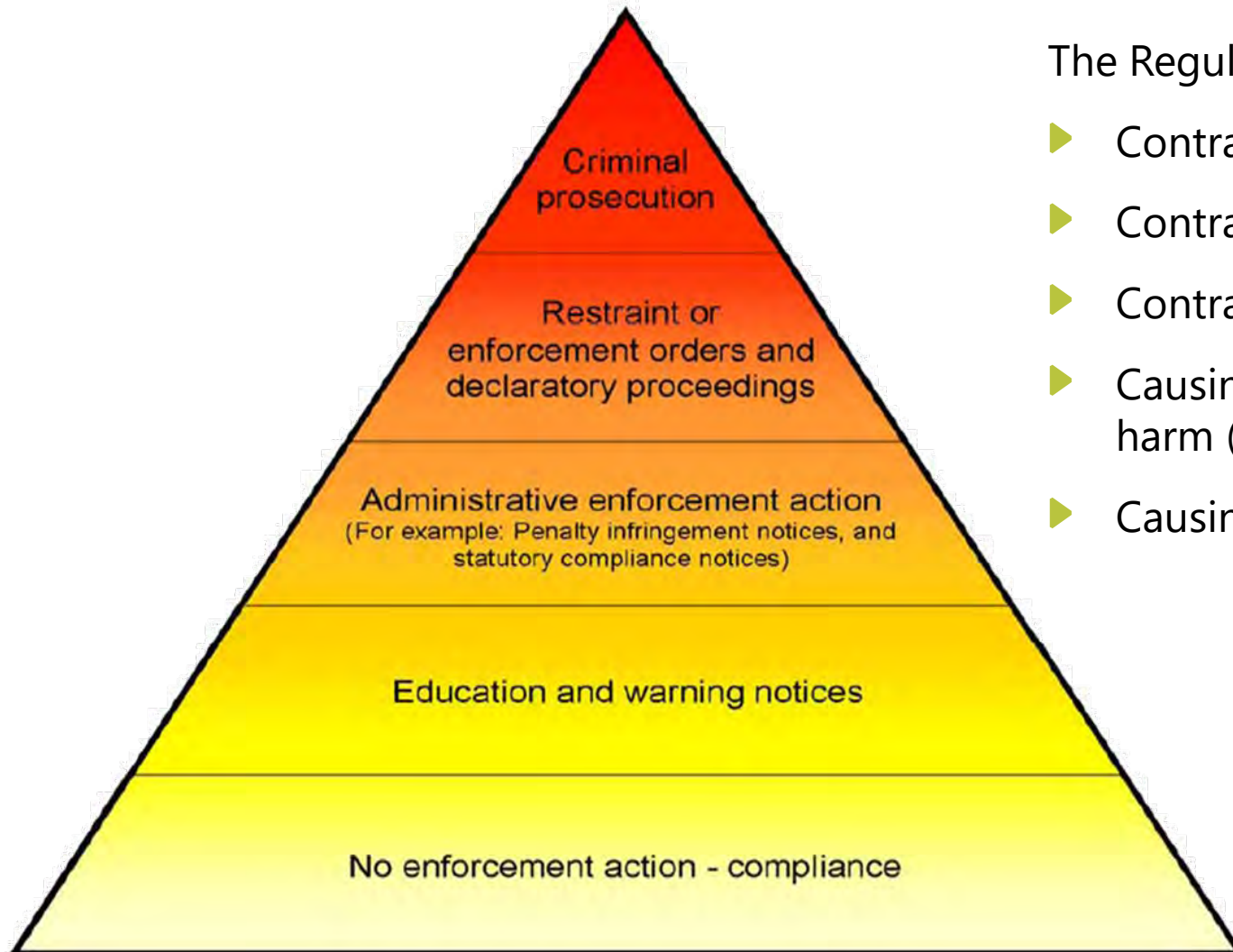
Section 215(1) EP Act

- ▶ Regulator may amend an EA at any time if it is necessary and desirable because of a matter in subsection 2

Section 215(2) EP Act – relevant matters

- ▶ Contravention of the EP Act
- ▶ Environmental offence
- ▶ Issue of an EEO
- ▶ Amendments to policy
- ▶ Environmental audits, investigations or reports
- ▶ Recognised entity report (DESI, local government, Ministerial Council, public authority, research centre, university)
- ▶ Significant changes to the activity

► Enforcement options



The Regulator can prosecute for:

- Contravening EA condition (s 430)
- Contravening a TEP (s 432)
- Contravening a site management plan (s 434)
- Causing unlawful serious or material environmental harm (ss 437 & 434)
- Causing unlawful environmental nuisance (s 440)

► Who is liable?

Liability under the EP Act

Polluter

- The person who caused the contamination incident
- The person who permitted the contamination incident to happen

Owner/occupier

- The occupier of a place at or from which the incident is happening or happened
- The owner, or person in control, of a contaminant involved in the incident

EA holder

- The person who holds a relevant environmental authority

► Who else is liable?

Increasing focus on failure to ensure compliance

Executive officers

- If corporation commits an offence, executive officers commit an offence
- For local government: CEO plus *'a person who ... takes part in the local government's management'* regardless of job title

Contractor breach

- Contractor may be the person who caused the contamination
- EA holder may also commit the offence of failing to ensure compliance of any contractors

'Related persons'

- Potentially responsible for rehabilitation and clean-up costs
- Where there is a connection, benefit or influence

► Protection of executive officers

- 1 Do policies and (critically) the implementation of those policies, demonstrate that executive officers have taken all reasonable steps to ensure compliance?
- 2 Do key personnel undertake regular training in environmental responsibilities and policy implementation?
- 3 Are tender and procurement processes up to scratch?
- 4 How closely do you manage your contractors to ensure compliance?
- 5 Do you carry out appropriate audits – and follow up on the results?

Is compliance enough?

Case study



▶ Fletcher v May

- ▶ Cattle feed lot alleged to have caused environmental nuisance by odour.
- ▶ Environmental harm is not unlawful if it is authorised by an EA, EEO, environmental policy etc.
- ▶ An EA **authorises an activity** rather than specifies the permitted level of environmental harm
- ▶ That is, the EA authorises the carrying out of sewerage treatment subject to release conditions rather than specifically authorising the release of contaminants

[24] “I am not sufficiently familiar with the Act to determine whether this proliferation of defined terms has any effect other than to uphold the modern Queensland practice of legislative complexity.”



▶ Liability for emerging contaminants

- ▶ Scenarios:
 - PFAS contaminated water
 - Biosolids sent to a third party
- ▶ Environmental harm is not unlawful if it is authorised by EA
- ▶ Comply with EA/EoW thresholds (many current EAs do not list PFAS as a contaminant)
- ▶ But is it a breach of the GED? Does a duty to restore arise?



Contact

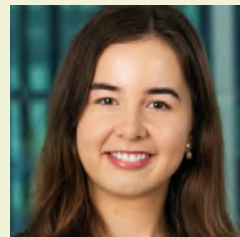


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Disclaimer: This presentation covers legal and technical issues in a general way. It is not designed to express opinions on specific cases. This presentation is intended for information purposes only and should not be regarded as legal advice. Further advice should be obtained before taking action on any issue dealt with in this presentation.

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